Supreme Court
I

97 • 635 OCT - 9 1997

OFFICE OF THE CLERK

No.

In The

Supreme Court of the United States

October Term, 1997

FORT SMITH RAILROAD CO.,

Petitioner,

vs.

AMERICAN TRAIN DISPATCHERS DEPT. OF THE BROTHERHOOD OF LOCOMOTIVE ENGINEERS,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

DANIEL A. LaKEMPER
Attorney for Petitioner
1318 South Johanson Road
Peoria, Illinois 61607
(309) 697-1400

72192

(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21

Lutz Appellate Services, inc.

QUESTION PRESENTED

Where the Railway Labor Act is silent as to the time and place of bargaining, do the parties to a labor dispute have a duty to bargain as to the site, and to bargain in good faith at reasonable times and reasonable places (as is required under the National Labor Relations Act), or does the Railway Labor Act confer the power to decide the time and place of bargaining upon the National Mediation Board; and, if the National Mediation Board has the power to decide the time and place of bargaining, do the federal courts have the power to enforce that decision through injunctive relief; and, if so, must the courts adhere to the provisions of the Norris-LaGuardia Act?

PARTIES TO THE PROCEEDING

Pursuant to Rule 14.1(b), Petitioner states that the only parties to this proceeding are named in the caption.

Petitioner's parent company is Pioneer Railcorp. There are no subsidiaries of Fort Smith Railroad Co.

TABLE OF CONTENTS

	Page
Question Presented	i
Parties to the Proceeding	ii
Table of Contents	iii
Table of Citations	iv
Opinions Below	1
Statement of Jurisdiction	1
Statutory Provisions Involved	1
Statement of the Case	2
A. Background of the Proceedings.	2
B. The Proceedings Below.	4
Reasons for Granting the Writ	4
I. The Petition Should Be Granted Because The Opinion Below Conflicts With Prior Decisions Of The National Labor Relations Board And Other Circuit Courts Of Appeal.	4
II. The Petition Should Be Granted Because The Opinion Below Conflicts With This Court's Prior Rulings On Railway Labor Act Injunctions.	7

Contents

Page

III. The Petition Should Be Granted Because The Opinion Below Conflicts With Prior Decisions Of Another Circuit Court Of Appeals As To The Appropriateness Of Judicial Intervention In The Mediation Process. 9

IV. The Petition Should Be Granted Because The Opinion Below Conflicts With The Congressional Intent Of The Railway Labor Act. 10

Conclusion 13

TABLE OF CITATIONS

Cases Cited:

American Train Dispatchers Dept. of the Brotherhood of Locomotive Engineers v. Fort Smith Railroad Co., 931 F. Supp. 618 (C.D. Ill. 1996) 1

American Train Dispatchers Dept. of the International Brotherhood of Locomotive Engineers v. Fort Smith Railroad Co., 121 F.3d 267 (7th Cir. 1997) 1

Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co., 394 U.S. 369 (1969) 4, 6

Burlington Northern Railroad Co. v. Brotherhood of Maintenance of Way Employees, 481 U.S. 429 (1987) 7, 8, 9, 13

Contents

	Page
Gulf Concrete Company, 165 NLRB 627 (No. 91, 1967)	5
International Association of Machinists and Aerospace Workers, AFL-CIO v. National Mediation Board, 930 F.2d 45 (D.C. Cir. 1991)	9
Local 808, Building Maintenance, Service and Railroad Workers v. National Mediation Board, 888 F.2d 1428 (D.C. Cir. 1989)	9, 10
NLRB v. Gilbralter Industries, Inc., 653 F.2d 1091 (6th Cir. 1981)	5, 6
NLRB v. P. Lorillard Co. 117 F.2d 921, 924 (6th Cir. 1941), *rev'd on other grounds*, 314 U.S. 512 (1942)	5
I. Appel Corporation, d/b/a Somerville Mills, 308 NLRB No. 425 (1992)	6
Queen Anne Record Sales, Inc., 273 NLRB 671 (1984)	6
Queen Anne Record Sales, Inc. v. NLRB, 772 F.2d 913 (9th Cir. 1985)	6
Semperit Pacific, Inc. 237 NLRB No. 478 (1978)	5

Contents

Page

Statutes Cited:

28 U.S.C. § 1254(1) 1

29 U.S.C. § 101, *et seq.* 2, 7

45 U.S.C. § 151, *et seq.* 1, 2, 5, 10

45 U.S.C. § 152 4

Other Authorities Cited:

Railway Labor Act: Hearings on S.2306 Before the Senate Comm. on Interstate Commerce, 69th Cong., 1st Sess. 13 (1926) (Testimony of A.P. Thom) 11

Railroad Labor Disputes: Hearings on H.R. 7180 Before the House Comm. on Interstate and Foreign Commerce, 69th Cong., 1st Sess. 18 (1926) (testimony of Donald R. Richberg) 11

APPENDIX

Appendix A — Opinion of the United States Court of Appeals for the Seventh Circuit Filed July 11, 1997 ..... 1a

Appendix B — Memorandum Order of the United States District Court for the Central District of Illinois at Peoria Filed June 18, 1996 ..... 10a

Petitioner, Fort Smith Railroad Co. ("FSR"), respectfully requests that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at *American Train Dispatchers Dept. of the International Brotherhood of Locomotive Engineers v. Fort Smith Railroad Co.*, 121 F.3d 267 (7th Cir. 1997). The Memorandum Order of the United States District Court for the Central District of Illinois at Peoria is reported at *American Train Dispatchers Dept. of the Brotherhood of Locomotive Engineers v. Fort Smith Railroad Co.*, 931 F. Supp. 618 (C.D. Ill. 1996).

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit ("Court of Appeals") was entered on July 11, 1996. No petition for rehearing was filed.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Railway Labor Act, 45 U.S.C. § 151, *et seq.* (the "RLA") governs labor relations in the railroad (and airline) industry.

The National Labor Relations Act, 29 U.S.C. § 151, *et seq.* (the "NLRA") governs labor relations in most industries not covered by the RLA.

The Norris-LaGuardia Act, 29 U.S.C. § 101, *et seq.* limits the jurisdiction of courts to enter injunctions in cases involving labor disputes.

Section 101 of the Norris-LaGuardia Act (29 U.S.C. § 101) provides:

> No court of the United States, as defined in this chapter, shall have jurisdiction to issue any restraining order or temporary or permanent injunction, except in a strict conformity with the provisions of this chapter; nor shall any such restraining order or temporary or permanent injunction be issued contrary to the public policy declared in this chapter.

STATEMENT OF THE CASE

A. Background of the Proceedings.

In August 1994, the American Train Dispatchers Division of the Brotherhood of Locomotive Engineers (the "Union") was certified by the National Mediation Board, pursuant to the Railway Labor Act, 45 U.S.C. § 151, *et seq.*, as the collective bargaining representative of the engineers, conductors and carmen of the Fort Smith Railroad Co.

Fort Smith Railroad Co. is a common carrier railroad performing switching services in and around Fort Smith, Sebastian County, Arkansas. In 1994 there were a total of five unionized employees, all located at Fort Smith, Arkansas.

Negotiations for an initial contract were held at the Company's headquarters in Illinois. A tentative agreement was reached at one point, but it was rejected by the members.

In February, 1996, the National Mediation Board ("NMB") mediator suggested the parties meet at the NMB's offices in Washington, D.C. FSR declined to meet there and suggested alternative sites. The Union agreed to a meeting in St. Louis, Missouri, and one was held there.

When that meeting did not produce a contract, the mediator (in April, 1996) again suggested meeting at NMB headquarters in Washington, and FSR again declined.

FSR's position was that it was obligated to meet at reasonable times and reasonable places, and that Washington, D.C. was not reasonable, given the parties circumstances.

The basis for this position is two-fold. First, unlike the Union, which is a nationwide organization, with a strong presence in Washington, D.C., FSR is a very small company, with no presence anywhere near Washington, D.C. FSR's union employees are all in Fort Smith, Arkansas. It would thus place a substantial and unequal burden on FSR to have to negotiate in Washington, D.C.

In addition, negotiating in Washington, D.C. could arguably subject FSR to the jurisdiction of the District of Columbia courts — a jurisdiction that would otherwise clearly not exist.

The Union had previously filed an action against FSR in the United States District Court in Fort Smith, Arkansas. Given that history (as well as other past experiences with foreign jurisdiction) FSR was unwilling to risk having to defend a lawsuit in the District of Columbia.

Unfortunately, the NMB did not attempt to mediate a compromise site, as it did in February.

B. The Proceedings Below.

On May 10, 1996, the Union filed an action in the United States District Court for the Central District of Illinois at Peoria, alleging that FSR violated the RLA, and seeking a Temporary and a Permanent Injunction against FSR.

The District Court asserted jurisdiction pursuant to 45 U.S.C. § 152, First.

After a short, consolidated hearing (which consolidation FSR objected to), the District Court ruled in favor of the Union, and subsequently entered a Temporary and Permanent Injunction requiring FSR to bargain "at such place, *including Washington, D.C.*, and times as the [National Mediation] Board deems appropriate". (Emphasis in original). Memorandum Order, p. 8 (App. B, p. 21a).

FSR appealed to the United States Court of Appeals for the Seventh Circuit. The Court of Appeals, in an opinion filed July 11, 1997, affirmed the District Court ruling.

REASONS FOR GRANTING THE WRIT

I.

THE PETITION SHOULD BE GRANTED BECAUSE THE OPINION BELOW CONFLICTS WITH PRIOR DECISIONS OF THE NATIONAL LABOR RELATIONS BOARD AND OTHER CIRCUIT COURTS OF APPEAL.

The Railway Labor Act is silent as to the situs of bargaining. This Court, however, in *Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 383 (1969), held that where the RLA must be interpreted, the courts should look to the NLRA for guidance as to "national labor policy".

It is well established law, under the National Labor Relations Act, 29 U.S.C. § 151, *et seq.*, that the situs of bargaining is a mandatory subject of bargaining, and a number of cases have dealt with the issue over the years.

As early as 1941, the Sixth Circuit provided a definition of that duty to bargain, which echoes FSR's position in this case. In *NLRB v. P. Lorillard Co.*, 117 F.2d 921, 924 (6th Cir. 1941), *rev'd on other grounds*, 314 U.S. 512 (1942), the court held that "The Employer must make his representatives available for conferences *at the plant where the controversy is in progress, and at reasonable times and places*, so that personal negotiations are practicable" (emphasis added).

In *Gulf Concrete Company*, 165 NLRB 627 (1967), the Board held that the Company violated the NLRA by insisting on bargaining in a city approximately 100 miles from where the bargaining unit and the employer's principal officer were located. (In the instant case, of course, the Union was insisting on bargaining several hundred miles from the bargaining unit and corporate headquarters.)

In *Semperit Pacific, Inc.*, 237 NLRB No. 478 (1978), the National Labor Relations Board ("NLRB") found that the Company violated the NLRA by demanding to bargain in Los Angeles, rather than Oakland, where the plant was located. The refusal "to meet at or near the plant in controversy" indicated the employer was acting in bad faith.

In the case of FSR, the only location where union workers were employed was in Fort Smith, Arkansas. FSR made clear its willingness to meet in Fort Smith, but the Union, emboldened by the position of the NMB, refused.

The Sixth Circuit dealt with the issue of the situs of bargaining again in *NLRB v. Gilbralter Industries, Inc.*, 653 F.2d

1091 (6th Cir. 1981). The court held that "Gibralter's desire to pursue discussions in New York does not detract from its expressed willingness to negotiate. Since the Olive Hill [Kentucky] plant was closed, and both the Union and Gibralter had their headquarters in New York, we see nothing unlawful or unreasonable with Gibralter's request." *Id* at 1096.

Queen Anne Record Sales, Inc., 273 NLRB 671 (1984), which cited *Lorillard*, was enforced by the Ninth Circuit without opinion at *Queen Anne Record Sales, Inc. v. NLRB*, 772 F.2d 913 (9th Cir. 1985).

In *I. Appel Corporation, d/b/a Somerville Mills*, 308 NLRB No. 425 (1992), the NLRB held that travel distance for a Company officer was a "legitimate interest". The Board found that alternating bargaining sites was not "unduly burdensome" to the Union, and held that the Company did not violate the NLRA by asking for alternating bargaining sites.

As in *Somerville*, FSR was not intransigent, and made alternative proposals, but the Union was unwilling to bargain and the NMB failed to perform its mediatory function by seeking a site acceptable to the parties.

It defies reason, and long-standing and well-developed precedent, to suggest that FSR acted in bad faith in suggesting a meeting in Fort Smith, or some other location closer to the employees.

If we follow the guidance of this Court in *Brotherhood of R.R. Trainmen* to look to the NLRA for national labor policy, the Court of Appeals ruling in this case is in direct conflict with long-standing rulings of the NLRB, as well as the Sixth Circuit and the Ninth Circuit. The petition should be granted to resolve the conflict between the Seventh Circuit and the NLRB and the other Circuits.

II.

THE PETITION SHOULD BE GRANTED BECAUSE THE OPINION BELOW CONFLICTS WITH THIS COURT'S PRIOR RULINGS ON RAILWAY LABOR ACT INJUNCTIONS.

FSR seeks a review of the granting of a Preliminary and a Permanent Injunction involving a labor dispute. It is well established law that injunctive relief is highly disfavored in labor disputes. The Norris-LaGuardia Act of 1932 (29 U.S.C. § 101) states:

> No Court of the United States . . . shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute, except in a strict conformity with the provisions of this chapter. . . .

This Court had occasion to consider the Norris-LaGuardia Act's application to Railway Labor Act disputes in *Burlington Northern Railroad Co. v. Brotherhood of Maintenance of Way Employees*, 481 U.S. 429 (1987). Noting that the Act's "language is broad because Congress was intent upon taking the federal courts out of the labor injunction business except in the very limited circumstances left open in the Act" *id.*, at 441, this Court held that a court can enjoin only the violation of a "specific mandate" of the RLA *id.*, at 444.

This Court not only rejected the argument that an injunction could be used to enforce a duty merely inferred from the RLA, but held that "Even when a violation of a specific mandate of the RLA is shown," courts should hesitate to use injunctive relief, "unless that remedy alone can effectively guard the Plaintiff's right." *id.*, at 446.

This Court rejected the requested injunction in *Burlington*

Northern even though it was consistent with the "primary goal of the RLA," because this Court found "nothing in the RLA to indicate that Congress intended to permit federal courts to enjoin secondary activity," *id.*, at 451.

Similarly, there is nothing in the RLA to indicate that Congress intended to give the NMB the power to compel bargaining at a particular time or place, let alone give the federal courts the power to enforce such decisions by injunctive relief. Indeed, the District Court admits in its order that there is no specific provision in the RLA to base its decision on. The Court found the power to issue directives to the parties as to time and place to be "part of the *inherent* authority of the Board to resolve such disputes . . ." Memorandum Order at p. 5, ¶ 8 (App. B, p. 17a) (emphasis added).

Having discovered the Board's "inherent" authority, the District Court then made no attempt to justify its enforcement by injunction, and made virtually none of the findings required by the Norris-LaGuardia Act. Both the District Court and the Court of Appeals totally ignored the mandates of this Court in *Burlington Northern*.

This petition should be granted so that this Court can reaffirm the application of the Norris-LaGuardia Act to Railway Labor Act disputes.

III.

THE PETITION SHOULD BE GRANTED BECAUSE THE OPINION BELOW CONFLICTS WITH PRIOR DECISIONS OF ANOTHER CIRCUIT COURT OF APPEALS AS TO THE APPROPRIATENESS OF JUDICIAL INTERVENTION IN THE MEDIATION PROCESS.

In *Local 808, Building Maintenance, Service and Railroad Workers v. National Mediation Board*, 888 F.2d 1428 (D.C. Cir. 1989) and *International Association of Machinists and Aerospace Workers, AFL-CIO v. National Mediation Board*, 930 F.2d 45 (D.C. Cir. 1991), the Court of Appeals for the District of Columbia Circuit was asked to intervene in mediations. In both situations the court, citing both this Court's decision in *Burlington Northern*, and the legislative history of the Railway Labor Act, declined to do so.

Ironically, the Union has relied on these cases heavily in its argument for judicial intervention, and the Court of Appeals cited them in its decision.

The reliance of the Union and the Court of Appeals upon these cases is misplaced. In fact, the decision of the Court of Appeals is in conflict with the rulings of the D.C. Circuit in both *Local 808* and *International Assn. of Machinists and Aerospace Workers*. These cases stand for the proposition that courts should stay out of the mediation process, and leave the mediator alone to mediate.

The conclusion of the Court of Appeals that "If the Railroad could refuse to attend mediation sessions called by the NMB on the basis of location, the Railroad could in effect refuse to continuing negotiating" (Order, p. 8, ¶ 1., App. A, p. 8a) is plainly erroneous. The NMB was holding the parties in

mediation. Both parties still had a duty to bargain in good faith. Had the District Court declined the Union's invitation to intervene in this case, as the D.C. Circuit did in *Local 808*, the Union would have had to go back to the bargaining table. Perhaps that table would have been in Fort Smith, instead of in Washington, but bargaining nevertheless would have continued.

The petition should be granted to resolve the conflict between the Seventh Circuit and the District of Columbia Circuit as to the appropriateness of judicial intervention in RLA mediation.

IV.

THE PETITION SHOULD BE GRANTED BECAUSE THE OPINION BELOW CONFLICTS WITH THE CONGRESSIONAL INTENT OF THE RAILWAY LABOR ACT.

The NMB's function under the RLA is to bring the parties to an agreement through mediation (45 U.S.C. § 155, First).

Congress set up the NMB with the clear intent of it being a neutral body that would earn the trust of both sides to a dispute. Congress intentionally did not grant the NMB's mediators any decision-making, fact-finding, adjudicatory or arbitration powers.

The legislative history of the RLA is replete with references to maintaining the impartiality of the NMB by denying it decision-making powers.

Donald R. Richberg, the principal spokesperson for labor at the House hearings on the RLA testified at length as to the "fundamental cause" of the failure of the NMB's predecessor

being the loss of its persuasive authority due to its obligation to render opinions for and against the parties.

Richberg stated clearly that the Board, in order to "preserve its ability to mediate year after year between the parties" must not make decisions. "Their duty is that of remaining persuaders". Richberg rejected the proposition of judicial intervention in mediation, except "if they [either party] refused absolutely to confer, to meet or discuss or negotiate." In that situation, he said, "I think there is a question as to whether there might not be invoked some judicial compulsion. . . ." Railroad Labor Disputes: Hearings on H.R. 7180 Before the House Comm. on Interstate and Foreign Commerce, 69th Cong., 1st Sess. 18 (1926) (testimony of Donald R. Richberg).

The chief spokesperson for management, A. P. Thom, echoed Richberg's words in his testimony to the Senate:

> the board of mediation is intended to continue to be regarded by both parties as an impartial body. . . . They must continue with their powers of conciliation unimpaired, and they could not do that if they are to render judgment . . .

Railway Labor Act: Hearings on S.2306 Before the Senate Comm. on Interstate Commerce, 69th Cong., 1st Sess. 13 (1926) (Testimony of A.P. Thom).

There has been a great deal of confusion in this case about whether or not the District Court was enforcing an NMB order. The Union has waffled on this issue, implicitly recognizing the weakness of its position. The District Court, on the other hand, clearly thought it was enforcing an order (mandate, or whatever one wishes to call it). "Inherent authority" to resolve a dispute

with a "mandatory" directive is, by any name, decision-making, not persuading. The District Court was, in essence, turning the NMB into a regulatory agency. That was not what Congress intended and that transformation threatens to destroy the structure of the RLA.

For over seventy years the RLA has been largely successful in avoiding kind of disputes which plagued the country prior to its passage. That success is based in large part upon the ability of the NMB mediators to remain neutral, and to keep the trust of both parties. That balance is imperiled by the Court of Appeals decision in this case. Once mediators start making decisions they cease to be persuaders.

Indeed, such a mediator would have the power to force great economic hardship upon one or the other party. If a small company can be ordered to Washington, what is to prevent the mediator from ordering a small company (or a small union) from, say the northeast, to bargain in Alaska, or Mexico, simply by saying that the Mediator has determined convening there will "further the purpose" of reaching agreement? At oral argument before the Court of Appeals, counsel for the NMB, in answer to a question from the bench regarding where might be unreasonable could only suggest that "China might be".

Once a mediator's recommendation or suggestion as to a meeting site can be converted into an order with the force of law, persuasion gives way to compulsion and the mediator ceases to be a neutral. The parties will start to consider what other recommendations can be so converted.

The Board has started down the slippery slope of decision-making that Congress sought so diligently to prevent when it passed the RLA. The injunction entered in this case does violence to the notion of the mediator as an impartial persuader,

and to the intent of Congress that the mediator maintain that posture.

The petition should be granted to preserve the legislative prerogative which this Court sought to preserve in *Burlington Northern*, as well as the integrity of the NMB as a mediator.

CONCLUSION

This case presents a question of exceptional importance to the future of labor disputes in one of the nation's most important industries. If the opinion below is allowed to stand, the future of many small and regional railroads and airlines (and small unions) will be imperilled by the sheer costs of bargaining. More importantly, the role of the National Mediation Board as a mediator will be seriously eroded. Its new-found coercive power will eventually destroy its ability to function as neutral because the parties will view the Board as a party to the negotiations (as, indeed, it has placed itself in this dispute), and the Board's effectiveness in resolving disputes as a go-between will cease. The very evils which the drafters of the RLA sought so diligently to avoid will have returned to the industry.

In addition, if the opinion below is allowed to stand, it will mark a new entry by the federal courts into labor disputes, in contravention of the Norris-LaGuardia Act.

By granting FSR's petition for certiorari, this Court can reaffirm the traditional role of the NMB as an honest broker and neutral mediator; restore the proper balance of the economic burdens of negotiations between the parties to labor disputes; and reaffirm the Congressional policy of keeping the federal courts out of the mediation process and the labor injunction business.

Accordingly, FSR respectfully requests that its petition for writ of certiorari be granted.

Respectfully submitted,

DANIEL A. LaKEMPER
Attorney for Petitioner
1318 South Johanson Road
Peoria, Illinois 61607
(309) 697-1400

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DECIDED JULY 11, 1997

In the

United States Court of Appeals

For the Seventh Circuit

No. 96-2735

AMERICAN TRAIN DISPATCHERS DEPARTMENT OF THE INTERNATIONAL BROTHERHOOD OF LOCOMOTIVE ENGINEERS,

Plaintiff-Appellee,

v.

FORT SMITH RAILROAD COMPANY,

Defendant-Appellant.

Appeal from the United States District Court
for the Central District of Illinois, Peoria Division.
No. 96 C 1248—Joe B. McDade, *Judge*.

ARGUED DECEMBER 13, 1996—DECIDED JULY 11, 1997

Before CUDAHY, RIPPLE and KANNE, *Circuit Judges*.

CUDAHY, *Circuit Judge*. A strike by even a small part of our nation's railroad workers could bring much of interstate commerce to a halt and disrupt the daily lives of millions of Americans. This risk of disruption brought about the enactment of the Railway Labor Act, 45 U.S.C. § 151 *et seq.*, (RLA or Act). The Act's main purpose is to "avoid any interruption to commerce or to the operation of any carrier engaged therein." 45 U.S.C. § 151a. The RLA works not by controlling the types of independent action employers and unions can take after bargaining

has failed (*e.g.*, strikes, lockouts). Instead, the RLA strives to prevent interruptions of interstate commerce by creating a mediation structure which requires the parties to "exert every reasonable effort to make and maintain agreements . . . and to settle all disputes . . . to avoid any interruption to commerce." 45 U.S.C. § 152, First. The obligation that parties "exert every reasonable effort" has been described as the "heart" of the RLA. *Bhd. of R.R. Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 377-78 (1969). The obligation is a legal one, given shape by the National Mediation Board's (NMB) recommendations and "enforceable by whatever appropriate means might be developed on a case-by-case basis." *Chicago & N.W.R.R. Co. v. United Transp. Union*, 402 U.S. 570, 577 (1971). The NMB is free to "experiment[ ] with any mediation device that can fairly be said to be designed to settle a dispute without a strike and does not independently offend other laws." *Int'l Ass'n of Machinists v. Nat'l Mediation Bd.*, 930 F.2d 45, 48 (D.C. Cir. 1991). Any party to a dispute may invoke the NMB when the dispute concerns changes in rates of pay, rules or working conditions; the NMB may also proffer its services without a request from a party. 45 U.S.C. § 155, First.

Here, the Brotherhood of Locomotive Engineers (BLE), representing the locomotive engineers, conductor/brakemen and carmen employed by Fort Smith Railroad Co. (Railroad), invoked the NMB on March 28, 1995. At that point, negotiations had been ongoing since October 11, 1994. The NMB assigned Robert Martin to perform mediation, and sessions were held on May 2, August 15 and November 8 of 1995 and on January 30, 1996. All of these sessions were held at the Railroad's headquarters in Peoria, Illinois. On February 8, 1996, Stephen Crable, the NMB's Chief of Staff wrote the following letter to the parties:

> Mediator Robert B. Martin will resume mediation involving the Fort Smith Railroad Company and the BLE-ATDA Division, Case Nos. A-12715, A-12716 and A-12717, at the NMB's office in Washington, DC, at 10:00 a.m. on February 28 and 29, 1996. Please advise who will represent you and provide local telephone and fax numbers.

In immediate response the Railroad wrote: "we cannot agree to a meeting in Washington, D.C. We are, however, agreeable to meeting on February 28, or March 1 (Tuesdays and Thursdays are bad days for us), at a 'neutral' site. I have proposed Springfield, Illinois, since that is where Mr. Martin is located. . . . [W]e would also agree to St. Louis." The NMB acceded to the Railroad's objections and held the mediation session in St. Louis on February 28, 1996. Unfortunately, that session, like those before it, failed to result in a resolution.

The next mediation session was again scheduled to take place in Washington D.C., on April 24 and 25, 1996. And again, the Railroad objected to the site:

> [W]e do not feel that Washington, D.C. is an appropriate site. FSR's office is in Peoria, Illinois, and its operations are in Fort Smith, Arkansas. Washington is a very long way from both of those places.
>
> Secondly, FSR presented its final offer to the Union during our recent bargaining session in St. Louis. My notes indicate that Mr. Volz said he was not going to recommend the contract . . . .
>
> You indicated to me this morning that you felt the Union was rejecting the proposal. Assuming that the union is unwilling to accept our final proposal, because it does not include seniority, I think we all agreed in St. Louis that these negotiations are at impasse. . . .
>
> . . . .

> . . . Another bargaining session is not likely to be productive at this time.
>
> In summary, FSR believes these negotiations are at impasse, and, in any event, FSR is not agreeable to holding any negotiating sessions in Washington, D.C.

This letter obviously had an effect on the Union since only six days later it offered to drop its demands for seniority, overtime and the length of the agreement term. The Railroad, however, rejected the Union's offer, objecting to the yearly salary increase, bereavement leave and back pay. The Railroad reiterated its request that Robert Martin declare an impasse and release the parties from mediation. A last communication from the NMB read as follows:

> This is to advise you that mediation sessions scheduled for April 24 and 25, 1996, at the NMB offices, Washington, DC have been canceled because of carrier refusal to attend. Consistent with the Board's obligation under the Railway Labor Act to make its best efforts to assist the parties in making agreements, the mediator has determined that convening the parties in Washington, DC will further this purpose. Please advise me by no later than April 25, 1996 of four consecutive days in April or May in which you will be available to meet with mediator Martin.

No change in the parties' positions regarding the place to meet was forthcoming.

The Union sought both a temporary and a permanent injunction enjoining the Railroad from refusing to negotiate when and where the NMB recommended. The district court granted both injunctions after a consolidated hearing and trial. The Railroad now appeals, arguing that the district court improperly consolidated the hearing and trial, and erroneously issued both the temporary and permanent injunctions. We affirm.

Appendix A

I. Consolidated Hearing and Trial

The district court consolidated the hearing on the preliminary injunction and the trial on the permanent injunction shortly after the hearing had begun. The court justified consolidation on the grounds that the dispute encompassed only one factual issue—whether the NMB had issued a directive that the parties meet to negotiate in Washington, D.C.—leaving only legal issues requiring no further explication in a second proceeding. Under Federal Rule of Civil Procedure 65(a)(2), the hearing for a preliminary injunction can be consolidated with the trial on the merits "[b]efore or after the commencement of the hearing . . . for a preliminary injunction." Whether or not to consolidate the hearing with the trial is within the district court's discretion. *See Paris v. United States Dep't of Hous. & Urban Dev.*, 713 F.2d 1341, 1345 (7th Cir. 1983). The district court must provide "clear and unambiguous notice . . . before the hearing commences or at a time which will still afford the parties a full opportunity to present their respective cases." *Pughsley v. 3750 Lake Shore Drive Coop. Bldg.*, 463 F.2d 1055, 1057 (7th Cir. 1972). Because different standards of proof may apply in the hearing than in the trial, parties must be given a clear chance to object or to propose special procedures for the consolidation. *Id.*

At the start of the hearing on the preliminary injunction the district court informed the parties that it was of the opinion that the dispute was purely legal and that holding two separate proceedings (one for the preliminary injunction and one for the permanent injunction) would be a waste of the court's time. The Railroad objected on the grounds that it had not had enough time to prepare arguments in opposition to the injunction, but conceded that the dispute involved at most two questions: (1) whether the NMB had issued a directive or order that it wanted the parties to meet in Washington, D.C. and (2) whether such a move could be mandated by

the NMB or whether the location of negotiations was itself a subject for mediation between the parties.

We agree with the district court that this case involves only one legal issue and was thus ripe for final determination. The district court did not abuse its discretion in consolidating the hearing and the trial. Nor were the parties denied notice or an opportunity to present their cases in full. All evidence submitted by the parties was admitted and considered by the district court. More importantly, the district court recognized that the one factual issue (whether the NMB directed the parties to meet in Washington, D.C.) was easily resolved. The NMB is not endowed with powers of enforcement but is expected to act as a referee, if a rather free-wheeling and powerful referee. *See Int'l Ass'n of Machinists*, 930 F.2d at 48. Nevertheless, as a referee the NMB must observe the amenities in "requesting" certain actions; hence the Board's diffident language: "the mediator has determined that convening the parties in Washington, DC will further [the mediation]." However, 45 U.S.C. § 152, First endows the NMB's words with the force of law. The district court therefore found that the NMB[1] did direct the parties to meet in Washington, D.C., and the only question remaining was whether the Railroad must accede to the NMB's suggestion. It was appropriate for the district court to preserve judicial resources by consolidating the hearing and the trial.

---

[1] The Railroad argues that the correspondence from the NMB's Chief of Staff expressing the mediator's recommendations are not communications from the NMB itself. This is a specious argument since the NMB is "authorized by its order to assign, or refer, any portion of its work, . . . to an individual member of the Board or to an employee." 45 U.S.C. § 154, Fourth.

II. Preliminary & Permanent Injunctions

Both the preliminary and the permanent injunction turn on one issue: whether the Railroad violated the RLA by refusing to attend the NMB-called negotiation sessions in Washington, D.C. The parties' obligation to "exert every reasonable effort" is given shape by the recommendations of the NMB. 45 U.S.C. § 152, First. As noted, the NMB acts as a referee. "The Mediation Board makes no 'order.' . . . The function of the Board under § 2, Ninth is more the function of a referee. To this decision of the referee Congress has added a command enforcible by judicial decree. But the 'command' is that 'of the statute, not of the Board.'" *Switchmen's Union of N. Am. v. Nat'l Mediation Bd.*, 320 U.S. 297, 304 (1943) (interpreting the Board's power to determine Union representation). The issue here is whether a procedural determination by the Board (here involving the location for meeting) is enforceable in court. In this connection, our authority to review the actions of the NMB is "extraordinarily limited." *Local 808 v. Nat'l Mediation Bd.*, 888 F.2d 1428, 1433 (D.C. Cir. 1989); *Prof'l Cabin Crew Ass'n v. Nat'l Mediation Bd.*, 872 F.2d 456, 459 (D.C. Cir. 1989). We will intervene in the activities of the NMB only upon a showing of "patent official bad faith." *Int'l Ass'n of Machinists*, 930 F.2d at 48 (citing *Local 808, Bldg. Maintenance Serv. & R.R. Workers v. Nat'l Mediation Bd.*, 888 F.2d 1428, 1434 (D.C. Cir. 1990). But while our jurisdiction to review Board decisions is limited, our jurisdiction to enforce provisions of the Act is not. *See Air Line Pilots Ass'n Int'l v. Transamerica Airlines, Inc.*, 817 F.2d 510, 513 (9th Cir. 1987). And, of course, we do not closely examine what might be the Board's rationale for the sort of procedural decision made here. The D.C. Circuit has emphasized the deference to be accorded by courts to the NMB:

> The members of the Mediation Board are no more to be called to the courthouse to explain their undis-

> closed reasons for action than the members of a legislature. The Mediation Board is entitled to as strong a presumption as the legislature, that if any state of facts might be supposed that would support its action, those facts must be presumed to exist.
>
> . . . .
>
> It may well be that the likelihood of successful mediation is marginal. That success of settlement may lie in the realm of possibility, rather than confident prediction, does not negative the good faith and validity of the Board's effort. The legislature provided procedures purposefully drawn out, and the Board's process may draw on them even to the point that the parties deem "almost interminable."

Int'l Ass'n of Machinists v. Nat'l Mediation Bd., 425 F.2d 527, 540-41 (D.C. Cir. 1970). Whatever the NMB's reasons for choosing Washington, D.C., we find no evidence of "patent official bad faith." *Int'l Ass'n of Machinists*, 930 F.2d at 48. Nor would such a preference take attendance at the meeting outside of the Railroad's obligation to exert every reasonable effort. The Board is allowed to employ coercive techniques to bring the parties to conciliation. *See Id.* at 47.

If the Railroad could refuse to attend mediation sessions called by the NMB on the basis of location, the Railroad could in effect refuse to continue negotiating. The NMB's primary resource, the ability to force continuing negotiations almost interminably, would be thwarted. We therefore affirm the district court's grant of a permanent injunction.[2]

---

[2] We decline to review the district court's analysis regarding the issuance of the preliminary injunction as this matter is moot.

The injunction is accordingly

AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B — MEMORANDUM ORDER OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF ILLINOIS FILED JUNE 18, 1996

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

Case No. 96-1248

AMERICAN TRAIN DISPATCHERS DEPARTMENT OF THE BROTHERHOOD OF LOCOMOTIVE ENGINEERS,

Plaintiff,

v.

FORT SMITH RAILROAD CO.,

Defendant.

MEMORANDUM ORDER GRANTING PRELIMINARY AND PERMANENT INJUNCTIVE RELIEF

On May 28, 1996, an evidentiary hearing was held in this case on Plaintiff's Motion for Preliminary Injunction [Doc. #3-1] requiring Defendant to participate in mediation of the parties' collective bargaining dispute before the National Mediation Board ("NMB" or "Board"). Pursuant to Fed. R. Civ. P. 65(a)(2), the Court consolidated that hearing with a trial on the merits and ruled in favor of Plaintiff. Plaintiff filed a proposed Order on June 7, 1996. Defendant was granted leave to file an Answer to the Complaint and to file objections to Plaintiff's proposed Order. After considering all of the pleadings and the arguments on both sides, the Court makes the following FINDINGS OF FACT and CONCLUSIONS OF LAW:

Appendix B

FINDINGS OF FACT

1. The facts in this case are undisputed.

2. Plaintiff American Train Dispatchers Department of the Brotherhood of Locomotive Engineers ("the Union") is the certified collective bargaining representative under the Railway Labor Act (RLA) for the locomotive engineers, conductor/brakemen, and carmen employed by Defendant Fort Smith Railroad Co. ("Fort Smith" or "the Company").

3. On August 26, 1994, the Union served Defendant with a notice of proposed terms and conditions of employment to be incorporated into the parties' first collective bargaining agreement. On October 11, 1994, the parties began bargaining.

4. On March 28, 1995, the Union invoked the services of the National Mediation Board to assist the parties in their negotiations. The Board assigned federal mediator Robert Martin to assist the parties. Mediation sessions were held at the Company's headquarters in Peoria on May 2, August 15, and November 8, 1995, and January 30, 1996. However, no agreement was reached.

5. On February 8, 1996, the Board advised the parties that mediation would resume "at the NMB's office in Washington DC, at 10:00 A.M. on February 28 and 29, 1996." The Company replied that "we cannot agree to a meeting in Washington, D.C." but would meet in a "neutral site" in Springfield, Illinois, or St. Louis, Missouri. In response to this request, the Board rescheduled the mediation session to February 28, 1996, in St. Louis. No agreement was reached at that meeting.

6. On April 2, 1996, the Board advised the parties that mediation would resume "at the NMB's offices, Washington, DC, at 10:00 A.M. on April 24 and 25, 1996." The Company responded by letter that it was "not agreeable to the proposed meetings April 24 and 25" and made clear that it did "not feel that Washington, D.C. is an appropriate site. FSR's office is in Peoria, Illinois, and its operations are in Fort Smith, Arkansas. Washington is a very long way from both of these places."

7. On April 8, 1996, the Union wrote to the Company stating, "In order to reach an agreement, we are willing to drop our demands for a seniority provision, an overtime provision and a shorter agreement term and accept your last proposal with a few changes." The Union's two substantive changes were a fifty-cent an hour yearly wage increase and an increase in bereavement leave from two to three days.

8. On April 15, 1996, the Company rejected the Union's proposed changes and stated that it had "no choice but to ask Bob [Martin] to declare an impasse and release us from Mediation." On April 17, 1996, the Union wrote to the Board stating that it did "not agree with the carrier that an impasse has been reached" and that the Union "stands ready to meet with the carrier in Washington as previously directed by the NMB." That same day, the Company responded to the Union's letter and advised the Board that "Washington, D.C. is not an appropriate place to meet with the organization, and we are unwilling to meet there."

9. On April 22, 1996, Stephen E. Grable, the Chief of Staff of the Board, sent the following communication to the parties:

> This is to advise you that mediation sessions scheduled for April 24 and 25, 1996, at the NMB offices, Washington, DC have been cancelled because of carrier refusal to attend. Consistent with the Board's obligation under the Railway Labor Act to make its best efforts to assist the parties in making agreements, the mediator has determined that convening the parties in Washington, DC will further this purpose. Please advise me by no later than April 25, 1996 of four consecutive days in April or May in which you will be available to meet with Mediator Martin.[1]

10. On April 23, 1996, the Union responded that it was "available to meet on any days suggested by the Carrier, even if we have to rearrange our schedules to do so." However, that same day, the Company wrote to the Board stating, "[I]t remains our position that Washington, D.C. is not an appropriate place to meet with the organization." On May 6, 1996, the Board recessed the mediation sessions

---

1. The Court rejects Defendant's contention that a disputed question of fact exists as to whether this communication by the Board is mandatory in nature. While the Board did not explicitly "order" the parties to bargain in Washington, D.C., it did state that pursuant to its obligations under the RLA, it "has determined that convening the parties in Washington, DC will further this purpose." Such language is clearly mandatory. Because the Board has no inherent authority to enforce this directive, *Detroit and Toledo Shore Line R.R. Co. v. United Transp. Union*, 396 U.S. 142, 158 (1969), it is not surprising that the word "order" does not appear in the Board's pronouncement.

"until further notice" and advised the parties that "mediation will resume at request of either party."

11. On May 10, 1996, the Union filed a Complaint against the Company for preliminary and permanent injunctive relief requiring the Company to cease and desist from hindering the bargaining process. The Complaint also requested a declaration that the Company has violated the RLA. Along with the Complaint, the Union filed a motion for preliminary injunction.

CONCLUSIONS OF LAW

1. The Court has jurisdiction over this case pursuant to section 2, First of the Railway Labor Act which enforces the duty of a carrier to settle disputes. 45 U.S.C. § 152, First. This section of the RLA "was intended to be more than a mere statement of policy or exhortation to the parties; rather, it was designed to be a legal obligation, enforceable by whatever appropriate means might be developed on a case-by-case basis." *Chicago and North Western Ry. Co. v. United Transp. Union*, 402 U.S. 570, 577 (1971).

2. For purposes of the Railway Labor Act (RLA), the Union is a "representative" under 45 U.S.C. § 151, Sixth, and the Company is a "carrier" under 45 U.S.C. § 151, First.

3. This is a "major dispute" under the RLA because it relates to the formation of a collective bargaining agreement between the parties. *Burlington Northern R.R. Co. v. United Transp. Union*, 862 F.2d 1266, 1271 (7th Cir. 1988). Because major disputes concern the creation of contractual rights and pose the greatest threat to the goals of the RLA (i.e.

interruptions to commerce and labor strife), they are designed to be settled by the parties themselves through negotiation and mediation under the auspices of the National Mediation Board. *Id.* at 1272. The parties are not under compulsion to agree on specific issues, but rather to exhaust all possibilities of conciliatory, negotiated agreement before resorting to self-help measures. *Id.*

4. The judicial scope of review of Board decisions "is one of the narrowest known to the law." *International Assoc. of Machinists and Aerospace Workers, AFL-CIO v. National Mediation Bd.*, 930 F.2d 45, 48 (D.C. Cir.), *cert. denied*, 502 U.S. 858 (1991) *citing Local 808, Bldg. Maintenance Serv. and R.R. Workers v. National Mediation Bd.*, 888 F.2d 1428, 1433 (D.C. Cir. 1990). Thus, the Court will interfere with the Board's efforts only upon a showing of "patent official bad faith." *Id. citing Local 808*, 888 F.2d at 1434. In fact, no court has ever successfully ordered the Board to terminate its mediation processes. *Id.* One reason for this highly deferential standard is that the "Board will always know things about the parties and their dispute that the court does not know and can never know." *Local 808*, 888 F.2d at 1436. Thus, judges are in no position to second-guess the actions of mediators. *Id.* Moreover, intrusive judicial scrutiny would likely prolong the dispute and further detract from the mediatory effort. *Machinists & Aerospace Workers*, 930 F.2d at 49.

5. Engaging in a "take-it-or-leave-it" bargaining strategy does not sufficiently comply with the Board's statutory obligation to bring about a peaceful settlement by mediation. *Chicago and North Western Ry. Co. v. United Transp. Union*, 330 F. Supp. 646, 650-51 (N.D. Ill. 1971). Thus, the mere

invocation by one of the parties that mediation has "'failed" is not alone enough to end the process. *Machinists & Aerospace Workers*, 930 F.2d at 48. It could be said at any stage in a mediation process prior to a successful conclusion of a collective bargaining agreement that mediation up to that point had failed. *Id.* Moreover, the party's invocation that mediation has failed may only be a ploy designed to make the other side give in. *Id.* at 49. It is only when the Board itself notifies the parties "in writing that its mediatory efforts have failed" that Congress expected legal significance to attach to that finding. *Id.*

6. Defendant's position is that it is not challenging the Board's authority to pursue further mediation between the parties; it is only challenging the *place* of mediation which the Board has designated — Washington, D.C. Defendant contends that the location of mediation should be the subject of further bargaining between the parties. Defendant cites no authority for this proposition except to argue that section 2, Sixth of the RLA controls this dispute. 45 U.S.C. § 152, Sixth. However, by its terms, that section applies only to "minor" disputes between a carrier and its employees "arising out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules or working conditions." *See CSX Transp. Inc. v. Marquar*, 980 F.2d 359, 361 n.2 (6th Cir. 1992); *Bovers v. Flying Tiger Line Inc.*, 919 F.2d 291, 298-99 (2d Cir. 1992); *Burlington Northern*, 862 F.2d at 1271 n.4. Because this case involves a "major" dispute under the Act arising in the absence of a collective bargaining agreement, *Burlington Northern*, 862 F.2d at 1271, the provisions of 45 U.S.C. § 152, Sixth are inapplicable.

7. In this case, Defendant's refusal to mediate at the location designated by the Board is tantamount to declaring an impasse in the bargaining process. Unlike the previous occasion in which the Board acquiesced to Defendant's request to move the site of mediation from Washington, D.C. to St. Louis, the Board does not now appear to be wavering in its directive to hold the sessions in Washington, D.C. Just as Defendant cannot unilaterally declare an impasse in the face of continuing mediation by the Board, *Machinists & Aerospace Workers*, 930 F.2d at 48; *Local 808*, 888 F.2d at 1441, so too it cannot defy the authority of the Board to conduct mediation sessions at a particular location.

8. Perhaps the Board is purposefully directing that its mediation sessions be held in Washington, D.C. in order to gain a strategic advantage over Defendant and force it to agree to a collective bargaining agreement. However, this is part of the inherent authority of the Board to resolve such disputes and does not constitute the "patent official bad faith" necessary to overturn such a decision of the Board. *Machinists & Aerospace Workers*, 930 F.2d at 48; *Local 808*, 888 F.2d at 1434. If the Board has the authority to continue mediation in spite of one party's contention that an impasse has been reached, it should also be able to designate the particular location of the mediation over a party's objections.

9. The preliminary injunction requirements are more relaxed in the context of resolving major disputes under the RLA. District courts may enjoin a violation of the *status quo* pending completion of the required mediation procedures without the customary showing of irreparable injury. *Consolidated Rail Corp. v. Railway Labor Execs.' Assoc.*, 491 U.S. 299, 303 (1989); *see also Brotherhood of*

Appendix B

Maintenance of Way Employees, Lodge 16 v. Burlington Northern R.R. Co., 802 F.2d 1016, 1021 (8th Cir. 1986) (Arnold, J., concurring); *Division No. 1, Detroit Brotherhood of Locomotive Engineers v. Consolidated Rail Corp.*, 844 F.2d 1218, 1220, 1226 (6th Cir. 1988) (and cases cited therein). Thus, Plaintiff need not show irreparable injury in order to be entitled to relief.

10. However, even the traditional requirements for preliminary injunctive relief have been met here. In order to obtain a preliminary injunction, the movant must show: (1) that the case has some likelihood of success on the merits; (2) that no adequate remedy at law exists; (3) that the movant will suffer irreparable harm if the injunction is not granted. *Storck USA, L.P. v. Farley Candy Co.*, 14 F.3d 313, 313-14 (7th Cir. 1994). If these three conditions are met, the court must balance the harm to the movant if the injunction is not issued against the harm to the defendant if it is issued improvidently. The greater the movant's chance of success on the merits, the less strong a showing must it make that the balance of harms is in its favor. *Id.* at 314. In addition, the court must consider the public interest in its decision. *Id.*

    (a) In light of the preceding discussion that the Board should be accorded a great deal of deference in regard to its choice of location for mediation, Plaintiff's success on the merits is not only likely, but certain. The Court has decided this issue on the merits pursuant to Fed. R. Civ. P. 65(a)(2).

    (b) Plaintiff has no adequate remedy at law other than injunctive relief because the purpose of this case is

to continue the mediation process. Monetary compensation cannot substitute for continuation of bargaining.

(c) If the injunction is not granted, Plaintiff will suffer irreparable harm because the bargaining process will be effectively halted. Defendant could delay mediation for an indefinite period contrary to Plaintiffs rights under the Railway Labor Act.

(d) The balancing of harms weighs clearly in favor of Plaintiff. Because Plaintiff's likelihood of success is certain, Defendant would require a very great harm to shift the balance in its favor. Here, the most harm that Defendant can claim is that its representatives will have to travel to Washington, D.C. in order to engage in further mediation sessions. However, the Company has no right to have these sessions conducted at another location and must defer to the Board's authority on this matter. Defendant's argument that it will be harmed by being forced to accede to the jurisdiction of the Washington D.C. courts is disingenuous. In deciding on an appropriate place to mediate the dispute, the Board need not consider the potential jurisdiction of the courts in that location. Such a concern is irrelevant to the instant dispute and speculative at best.

(e) The public interest also demands that injunctive relief be granted. Because major disputes concern the creation of contractual rights and pose the greatest threat to the goals of the RLA, the public's interest in avoiding interruptions to commerce and labor disputes in the railroad industry weighs heavily in favor of Plaintiff here. Thus, preliminary injunctive relief is appropriate.

11. Defendant objects to the entry of a preliminary injunction without the giving of security pursuant to Fed. R. Civ. P. 65(c). However, Defendant suggests no specific amount for such a bond. Indeed, the only monetary damage that may occur if the Seventh Circuit finds this injunction to have been improvidently granted is the cost of Defendant's representatives' travel to Washington, D.C. Thus, the Court will set a bond of $3,000.00 which should be more than enough to cover such costs for Defendant's representatives.

12. By refusing to accede to the Board's request to mediate its dispute in Washington, D.C., Defendant has violated section 2, First of the Railway Labor Act. 45 U.S.C. § 152, First.

CONCLUSION

IT IS THEREFORE ORDERED that Defendant's Motion for Preliminary Injunction [Doc. #3] is **GRANTED**. Pursuant to Fed. R. Civ. P. 65(c), Plaintiff shall post **$3,000.00 as security** with the Clerk of the U.S. District Court for the Central District of Illinois by 5:00 p.m. on June 28, 1996. Such bond shall remain posted until the final disposition of this case on appeal or until the time for appeal has elapsed with no appeal filed.

IT IS FURTHER ORDERED that the preliminary injunction motion is consolidated with a hearing on the merits pursuant to Fed. R. Civ. P. 65(a)(2) so as to **GRANT PRELIMINARY AND PERMANENT INJUNCTIVE RELIEF** as follows:

> Defendant, its agents, officers, employees and representatives, shall immediately cease and desist from its refusal to participate in mediation as conducted by the National

Appendix B

> Mediation Board at such places, *including Washington, D.C.*, and times as the Board deems appropriate, provided that the Board acts in good faith. In compliance with Section 2, First of the Railway Labor Act, during such mediation, the parties shall exert every reasonable effort to reach an agreement concerning the rates of pay, rules, and working conditions of the employees whom Plaintiff represents.

The Court retains its jurisdiction to enforce any violation of this Order by contempt proceedings or otherwise.

IT IS FURTHER ORDERED that the Clerk of the Court shall enter final judgment in favor of Plaintiff, each party to bear its own attorney's fees and costs. This case is **TERMINATED**.

ENTERED this 18th day of June, 1996.

s/ Joe B. McDade
JOE BILLY McDADE
United States District Judge